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June 10, 1952

Opinion No. 52-179

Mr. A. Warren Austin  
State Dairy Commissioner  
State House  
Phoenix, Arizona

Dear Commissioner:

This is in reply to your letter of April 22, 1952, wherein you ask the following questions:

1. When did the term of office of the State Dairy Commissioner begin for 1952?
2. To what salary is he entitled under the present law?
3. Will his re-appointment by the Governor be necessary in order for him to receive the maximum salary as set up in Section 24 (a) of Chapter 153?

The Legislature of 1951 by Chapter 153 repealed all of the Dairy Code of the State of Arizona and enacted an entirely new code. They set the effective date of the new code as of July 1, 1951. This entire Chapter 153 is now designated in our supplement as Sections 50-962 to 50-993.

The present dairy commissioner holds his office under Chapter 54, Laws of 1949, which provides for the appointment of a dairy commissioner by the governor with the concurrence of the senate for a term coterminous with the governor and at a salary of \$4,200.00 per annum. That term expired in January 1951.. In 1951, by Chapter 153, provision is made for the appointment of a dairy commissioner by the governor with the concurrence of the senate for a term of two years commencing February 1 at a salary of not to exceed \$4,800.00 per year. No year is stated but means February 1, 1952. An appointment could have been made for the term beginning February 1, 1952 but was not done, and therefore, the present dairy commissioner occupies the office under the 1949 law as a holdover. The governor alone cannot make an appointment

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for the term beginning February 1, 1952, because such appointment requires senatorial confirmation. Rogers v. Frohmiller, 59 Ariz. 513, 130 Pac. 2d 217 and cases therein cited. However, as there is no holder of the office for the term beginning February 1, 1952, the governor may place someone in the office as a locum tenens without term to hold until an appointment is made for the remainder of the term.

The question then arises whether the locum tenens appointee may receive the increased salary provided for in the Act of 1951. The only limitation on an increase in salary of an officer is that contained in Section 17, Article 4, Part 2, of our Constitution, which provides the salary of an officer shall not be increased or diminished during his term. Had the present dairy commissioner been reappointed on February 1, 1952, or subsequent thereto, for the term beginning February 1, 1952, there is no question but that he could receive the additional salary provided for in 1951 because the increase was not made during the term beginning February 1, 1952, and section 17, supra, would not apply because it would not be an increase during the term of office. If the commissioner is appointed as a locum tenens, is he entitled to the increase allowed in 1951? We think he is. He is an occupant for the term beginning February 1, 1952, and is a makeshift for the person who would be entitled to hold the office for that term and is using up a part of the term. The appointee to the regular term will not hold the office for two years after his appointment but the term will expire February 1, 1954, regardless of when he is appointed.

If a locum tenens appointment is made, the procedure outlined in the Rogers-Frohmiller case should be followed.

Regarding the term of office of the State Dairy Commissioner, Section 50-902 of the 1939 Code provided that the commissioner shall be appointed by the governor for a term concurrent with the term of the governor appointing him. The Legislature by Chapter 54, Session Laws of 1949, amended this section as follows: The state dairy commissioner shall be appointed by the governor with the advice and consent of the senate for a term coterminous with that of the governor. These two expressions are synonymous and if the law had not been changed, the present commissioner's term would be up January 1, 1953; but by Chapter 153, Session Laws of 1951, Section 50-985, the Legislature said the state dairy commissioner shall be appointed by the governor with the advice and consent of the senate and shall serve for a term of two years commencing the first day of February.

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The Legislature by this enactment did not designate the particular February that this term of office would commence, but did say the effective date of the entire Chapter would be July 1, 1951.

Our general statute, Section 1-101, says "no statute is retroactive unless expressly so declared therein."

Our new dairy code failed to expressly declare that the term of office would revert back to the prior February 1; consequently, we are of the opinion that the term of office of the dairy commissioner began February 1, 1952.

Now, regarding the salary the dairy commissioner is entitled to receive, it becomes necessary to go into a little history regarding this. By Chapter 54, Session Laws of 1949, the Legislature raised the salary of the state dairy commissioner to \$4,200.00. In the new dairy code, Chapter 153, Session Laws of 1951, Section 50-985, the Legislature placed the salary of the dairy commissioner at not to exceed \$4,800.00, and then in the same session in the General Appropriation Bill, Chapter 151, Subdivision 20, specifically appropriated a salary for the commissioner of \$4,200.00. You will note that the Legislature, Section 50-985, said not to exceed \$4,800.00. We feel as though the Legislature by specifying the salary to be \$4,200.00 for the fiscal year 1951-52, intended that \$4,200.00 is the full amount the commissioner may receive for his services for that period.

The 1952 Legislature in making appropriation for the dairy commissioner, Subdivision 20 of Chapter 149, Session Laws of 1952, made a lump sum appropriation of \$15,000.00 for personal services. This will permit the dairy commissioner to receive \$4,800.00 for the 1952-53 fiscal year.

Very truly yours,

FRED O. WILSON  
Attorney General

CHAS. ROGERS  
Assistant Attorney General

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